In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 38

JAMES G. GLOVER, *et al.*,

Petitioners,

v.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF RESPONDENT BROTHERHOOD OF RAILWAY CARMEN OF AMERICA.

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QUESTION PRESENTED.

The question is:

Did the Courts below correctly decide that a mixed group of railroad carmen helpers (white and Negro) could not sue upon a contract claim for promotion to carmen, absent exhaustion or attempted exhaustion of available contractual and administrative remedies?

COUNTER-STATEMENT.

This case was decided in the Courts below on motions to dismiss filed by Respondents Railroad and Brotherhood. The original complaint was dismissed on July 28, 1966 (A. 14-15); the amended complaint on November 8, 1966 (A. 24).

The original complaint alleged that Petitioners, a group of fourteen carmen helpers, consisting of eight

Negroes and six white men, have been denied promotional rights to which purportedly they are entitled under the terms of the applicable collective bargaining agreement solely on account of the fact that the eight most senior members of the group were Negroes. None of the contract provisions relied upon was pleaded either verbatim or in substance, however. The alleged discrimination was said to have been brought about through a "tacit understanding" and "subrosa agreement" between Railroad and Brotherhood pursuant to which journeymen (carmen) were to be selected from the ranks of carmen apprentices rather than from carmen helpers who formerly were temporarily upgraded and were known as "upgrade Carmen" (A. 5-7).

The complaint alleged that damages consist of wage losses in excess of $10,000.00 for each Petitioner caused because "they have not been correctly called out to work as Carmen and have not been promoted to Carmen when there have been openings for work and promotion in the Carmen work classification." Monetary and injunctive relief is sought.

The original complaint took cognizance of three sets of contractual and statutory remedies available to Petitioners. They were alleged to be: (1) the "grievance machinery in the Collective Bargaining Agreement," (2) "the grievance machinery in the constitution of the Brotherhood," and (3) "the procedure before the National Railroad Adjustment Board." Petitioners concluded, however, "(b)ecause of the nature of their claim and the failure of defendant Brotherhood to institute any grievance on their behalf, [these] remedies * * *, are all wholly inadequate" (Complaint, para. 7, A. 7). The district court dismissed the original complaint on the ground that "such remedies are to be pursued as a prerequisite to relief in the federal courts" (A. 14-15). The court stated:

> "The conclusionary averment that because of the nature of their claim and the failure of defendant Brotherhood to institute any grievance on their behalf such remedies are wholly inadequate is not equivalent to a contention that they are *unavailable*." (Emphasis ours.)

After dismissal, Petitioners amended the complaint by substituting a new paragraph 7 (A. 18-20). The language of the substitute paragraph 7 accused unidentified alleged representatives of Respondents Railroad and Brotherhood of verbally discouraging Petitioners from filing grievances with either Railroad or Brotherhood, and, also, charged Brotherhood with failing to prepare and submit *on its own initiative* a grievance on their behalf to attempt to remedy the alleged "violation of the collective bargaining agreement." Petitioners still did *not* allege that the contractual and statutory remedies described in their original complaint were unavailable to them, however; nor did they allege that they, or any of their group, actually attempted to invoke any of such remedies by filing a claim, grievance, or submission with the appropriate person or tribunal. To the contrary, they pleaded that the verbal disparagement of these remedies by the alleged "representatives" of Railroad and Brotherhood made recourse to them unnecessary because they would be "futile." Thus, they alleged:

> "* * * to employ the purported internal complaint machinery within the Brotherhood itself would only add to plaintiffs' frustration and, if ever possible to pursue it to a final conclusion it would take years. To process a grievance with the Company without the cooperation of the Brotherhood would be a useless formality. To take the grievance before the National Railroad Adjustment Board (a tribunal composed of paid representatives from the Companies and the Brotherhoods) would consume an average time of five years, and would be completely futile under the

> instant circumstances where the Company and the Brotherhood are working 'hand-in-glove.' All of these purported administrative remedies are wholly inadequate, and to require their *complete* exhaustion would simply add to plaintiffs' expense and frustration, would exhaust plaintiffs, and would amount to a denial of 'due process of law,' prohibited by the Constitution of the United States." (Emphasis ours.) (A. 19-20.)

The motions of Respondents Railroad and Brotherhood to dismiss Petitioners' amended complaint were sustained by the district court on the ground that the amendment to the complaint "* * * does not cure the defect pointed out in the memorandum opinion of this Court entered herein on July 28, 1966 * * *" (A. 24). The Circuit Court of Appeals affirmed (A. 28).

ARGUMENT.

I. The claim against the Brotherhood for breach of the duty of fair representation was properly dismissed for failure to plead a serious attempt to pursue remedies available under the Brotherhood's constitution.

The district court's dismissal of the initial and amended complaints was predicated upon the narrow but significant ground of failure to exhaust contract and statutory remedies. The merits of the claims Petitioners were seeking to litigate were never reached in the lower courts, so the Brotherhood will not discuss them herein at any length. It seems clear that Petitioners' claim against the Brotherhood is for breach of the duty of fair representation which is imposed by implication from the exclusive representation provisions of the Railway Labor Act [48 Stat. 1185, 45 U.S.C. § 151 et seq.].

Suffice it to say that the Brotherhood, a labor organization national in scope and consisting of thousands of members affiliated in hundreds of local lodges, does not favor, countenance, or condone racial discrimination on the part of the Grand Lodge and its representatives or local lodges or subordinate units and their representatives. The Brotherhood should not, and agrees that it could not legally, enter into a "tacit understanding" or "subrosa agreement" to deny contractual promotional rights to a group of employees solely on account of the race or color of some members of the group, such as is alleged by Petitioners in the complaint. There is no need to belabor this point. The significant question relating to the merits of Petitioners' claim is whether they can prove through competent evidence the facts so broadly alleged in the complaint.

However, the courts below held that Petitioners had a duty as union members to resort to certain remedies contained in the Brotherhood's constitution before seeking relief in court against the Brotherhood for breach of the duty of fair representation. The district court did *not* hold that Petitioners had to exhaust *completely* all possible remedies under the Brotherhood's constitution. No more than a reasonable *attempt* to utilize *available* remedies was required. If the remedies afforded thereunder were somehow deficient because they could not afford proper relief or took too much time or for some other reason, their exhaustion obviously would have been excused. Nevertheless, it requires more than an allegation of the bare conclusion that the union remedies are futile to establish futility as a factual matter in the pleadings.

The recent decision in *Vaca v. Sipes*, 386 U.S. 171 (1967), dealt with the interrelation between suits against

a labor union for breach of the duty of fair representation and suits against an employer for breach of contract. The Court there held that the general rule applicable to suits against the employer as set forth in *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965) is that "the employee must *at least attempt to exhaust* exclusive grievance and arbitration procedures established in the bargaining agreement." (Emphasis ours.) *Id.* at 184. Certain exceptional circumstances were recognized, however, under which an employee was excused from the duty to resort to them. The same rule of resort to contractual remedies should apply in circumstances where the union member brings suit against the union because a union constitution is generally considered to be a contract of membership between the union and its members, *International Association of Machinists v. Gonzales*, 356 U.S. 617 (1958).

The instant case is one in which, from what the allegations of the complaint reveal, *no* efforts to bring the

that Petitioners do not dispute the availability of procedures to compel grievances to be processed on behalf of employee members. Petitioners evidently are content to stand on the proposition that the alleged informal disparagement of resort to these remedies, by *unidentified* representatives of the Brotherhood, excused them from actually following or utilizing them. This is the issue.

A decision by local level union representatives to refuse to handle a grievance for an employee may be and often is completely reversed at a higher level in the union heirarchy. For instance, in *New Orleans Public Belt R. R. Comm. v. Ward*, 195 F.2d 829, 833 (5th Cir. 1952), a railroad employee (Mrs. Ward), who was not even a member of the union that acted as her statutory representative (the

Brotherhood of Railway and Steamship Clerks), found that her name had been removed from the seniority list pursuant to the protest of the Brotherhood. She protested this act to the carrier to no avail and then conferred with the *local* representative of the Brotherhood who *refused* to represent her in connection with her grievance. She did not stop at this point, however, but sought further assistance from the Brotherhood and "finally was successful in obtaining the assistance of the *national* representatives of the Brotherhood consisting of the System Committee who prosecuted her claim for her before the National Railroad Adjustment Board." The point is that unless an attempt is made to bring the matter of improper representation to the attention of the responsible officials of a labor organization, it cannot be said that satisfactory resolution of the dispute is unavailable through internal corrective action.

Very recently, in *Clayton v. International Union of Marine and Shipbuilding Workers of America, etc.*, _____ U.S. ____, 36 LW 4491, 4493 (1968), the Court in commenting on the language of § 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959 [73 Stat. 522, 29 U.S.C. § 411(a)(4)] which states that a union member "may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization before instituting legal or administrative proceedings * * *," observed:

> "We conclude that 'may be required' is not a grant of authority to unions more firmly to police their members but a statement of policy that the public tribunals whose aid is invoked may in their discretion stay their hands for four months, while the aggrieved

person seeks relief within the union. We read it, in other words, as installing in this labor field a regime *comparable to that which prevails in other areas of law* before the federal courts, which often stay their hands while a litigant seeks administrative relief before the appropriate agency." (Emphasis ours.)

The requirement of exhaustion of remedies is a matter within the sound discretion of the courts, and, as the Court pointed out in footnote 8 to its opinion in *Industrial Union of Marine and Shipbuilding Workers, etc., supra*, is not required when the remedies are inadequate. Nevertheless, the breach of the duty of fair representation issue raised in the instant case is one on which the parent or international labor organization, which is being sued herein, *should* have the first opportunity to take corrective action. The fidelity with which the Brotherhood's representatives in the field discharge their duties as collective bargaining agents is a matter of primary concern to the Brotherhood inasmuch as it may be legally responsible for improper acts on their part. The Brotherhood will be better enabled to furnish adequate representation within the letter and the spirit of the law if its members such as Petitioners are required at least to attempt to bring their claims of improper representation to the attention of responsible officers highly enough situated to put the organization on notice of the alleged misconduct of its agents. As Mr. Justice Harlan concurring in *Industrial Union of Marine and Shipbuilding Workers, etc., supra*, said (36 LW at 4494):

"Responsible union self-government demands, among other prerequisites, a fair opportunity to function."

A similar view was expressed in *Wirtz v. Local Union No. 125, Laborers Int'l. Union*, 389 U.S. 477, 19 L. ed. (adv.) 716, 722 (1968), where, in referring to the exhaustion of

remedies requirement in Section 402(a) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 534, 29 U.S.C. § 482 (a), the Court said:

> "It is true that *the exhaustion requirement was regarded by Congress as critical to the statute's objective of fostering union self-government.* By channeling members through the internal appellate processes, Congress hoped to accustom members to utilizing the remedies made available within their own organization; at the same time, however, unions were expected to provide responsible and responsive procedures for investigating and redressing members' election grievances. These intertwined objectives are not disserved but furthered by permitting the Secretary to include in his complaint at least any § 401 violation he has discovered which the union had *a fair opportunity to consider and redress* in connection with a member's initial complaint." (Emphasis ours.)

The decision of the trial court to require a reasonable attempt at utilization of remedies under the Brotherhood's constitution was a matter lying within its sound discretion. Indeed, the decision appears to be not merely desirable but virtually obligatory in light of this Court's recent Labor-Management Reporting and Disclosure Act pronouncements which intimate strongly that exhaustion of, or at least reasonable resort to, remedies provided under union constitutions as a condition precedent to suit in court is a favored concept under principles of federal labor law. A suit against a labor organization for breach of the duty of fair representation, as was pointed out earlier, is a suit based upon precepts of general federal labor law. *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944); *Conley v. Gibson*, 355 U.S. 41 (1957); *Vaca v. Sipes, supra.*

The trial court did not err, therefore, in dismissing the amended complaint against the Brotherhood on the ground

that Petitioners failed to allege resort to remedies available under the Brotherhood's constitution which might have afforded Petitioners relief from the purported unfair representation, or to plead a sufficient justification or excuse for failing to do so.

II. The claim against the Railroad for breach of contract must be processed to the National Railroad Adjustment Board.

The other claims which were dismissed by the trial court sought monetary relief equivalent to back pay allegedly due Petitioners and a readjustment of their employment status in accordance with what they contend is required pursuant to the provisions of the applicable collective bargaining agreement. These are claims against the Railroad for breach of contract, and the relief sought is in the nature of a decree of specific performance of a contract for personal services.

Inasmuch as Petitioners are suing as current railroad employees seeking to enhance their employment status, it seems plain that their claims must be submitted before the appropriate division of the National Railroad Adjustment Board for final and binding determinations in accordance with Section 3 First (i) of the Railway Labor Act [48 Stat. 1185, 45 U.S.C. § 153 First (i)]. This Court has consistently so held since *Slocum v. Delaware L. & W. R. Co.*, 339 U.S. 239 (1950) and *Order of Ry. Conductors v. Southern Ry.*, 339 U.S. 255 (1950).

The only exception to this rule is under the doctrine of *Moore v. Illinois Central Railroad Co.*, 312 U.S. 630 (1941) where "a discharged railroad employee aggrieved by his discharge may either (1) pursue his remedy under the administrative procedures established by an applicable collective bargaining agreement subject to the Railway

Labor Act, and his right of review before the National Railroad Adjustment Board, or (2) if he accepts his discharge as final, bring an action at law in an appropriate state court for money damages if the state courts recognize such claims." *Walker v. Southern R. Co.*, 385 U.S. 196 (1966). In all other cases "the Act compels the parties to arbitrate minor disputes before the National Railroad Adjustment Board established under the Act." *Id.* at 198.

Petitioners contend that the Adjustment Board would not be a fair and impartial tribunal in their case because the members of the Second Division, before whom their claims would be heard, are selected and compensated in part by the railroad industry and the railway labor organizations which are national in scope. On this analysis, there would be built-in bias every time an individual employee, contrary to the wishes of his statutory representative, took a claim to the Adjustment Board. There is no merit to such argument. An award of a division of the Adjustment Board, moreover, can be set aside in the courts by an aggrieved employee or employees on the ground of "fraud or corruption by a member of the division making the order" pursuant to Section 3 First (q) of the Act [80 Stat. 208, 45 U.S.C. § 153 First (q)].

Petitioners also contend that an average time lapse of 5 years occurs before a matter is disposed of before the Adjustment Board. This, even if it were true, would not excuse railroad employees from resorting to such mandatory statutory procedure. However, it was noted in *Walker v. Southern R. Co., supra,* at 198, that the Section 3 of the Railway Labor Act was "drastically" revised in 1966 to correct some of the alleged abuses in Adjustment Board procedures, of which the time lag was one of the most notable. Since Petitioners are situated in the carmen's craft or class, their claims would be submitted before the

Second Division of the National Railroad Adjustment Board. Reference to the most recent volume of published awards of the Second Division (Volume 49, *Awards of the Second Division, National Railroad Adjustment Board,* Keenan Printing Company, Chicago, Illinois) reveals that in most instances the submissions were handled to a conclusion in less than three years. The cases reported in Volume 49, moreover, cover the period February 26, 1965, to July 10, 1965, and, thus, do not reflect the significant 1966 revisions in Adjustment Board procedures commented upon in *Walker, supra.*

In certain respects, Petitioners are attempting to utilize the racial issue as a justification to avoid their obligations as railroad employees to comply with the statutory procedure prescribed by the Railway Labor Act. *Pennsylvania R. Co. v. Day,* 360 U.S. 548, 551-552 (1959) provides an illuminating analogy on this point. In *Day,* a retired railroad employee sought to sue in court on a claim against a carrier for substantial back pay allegedly due as a result of improper work assignments. His claim was initiated while he was an active employee, and was processed initially "on the property" up to the carrier's chief operating officer in the region where he was employed. It was denied at that level, whereupon the employee retired from active service. He thereafter instituted civil suit against the carrier for breach of contract, and contended that inasmuch as at the time suit was filed he was a retiree rather than an active employee, the strictures of *Slocum, supra,* and *Order of R. Conductors v. Southern R. Co., supra,* were not applicable. He argued that, as a retiree, his right to sue in the courts for vindication of his contract claim was analogous to the right of a discharged employee to sue in court under the *Moore* doctrine. This Court disagreed and said (*Id.* at 552):

> "* * * All the considerations of legislative meaning and policy which have compelled the conclusion that *an active employee must submit his claims to the Board,* and may not resort to the courts in the first instance, *are the same when the employee has retired* and seeks compensation for work performed while he remained on active service. *A contrary conclusion would create a not insubstantial class of preferred claimants.* Retired employees would be allowed to bypass the Board specially constituted for hearing railroad disputes whenever they deemed it advantageous to do so, whereas all other employees would be required to present their claims to the Board. This case forcefully illustrates the difficulties of such a construction." (Emphasis ours.)

The language quoted above seems equally pertinent to the Petitioners' theory herein. Neither retirees nor Negro employees are placed in a specially preferred category *under the Railway Labor Act.* Petitioners proceeding on their fallacious premise of racial exceptions from general rules argue in the Petition herein, at pages 18 and 19, that *Republic Steel Corp. v. Maddox, supra,* which explicated the prevailing rule requiring exhaustion of remedies under collective bargaining agreements, would have been decided differently if racial discrimination had been an issue in that case. We urge the Court to make it clear in its opinion in this case that there is no preferred status in litigation based on race and to emphasize that the Railway Labor Act is uniform in its applicability to railroad employees as a whole.[1]

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[1] The issue of the rights and remedies available to Petitioners or some of them, under the provisions of Title VII of the Civil Rights Act, 78 Stat. 253, 42 U.S.C. § 2000 (e), is not involved here. As the district court noted in its Memorandum Opinion, one of the plaintiffs in the instant case, James C. Dent, also brought suit in the style of a class action against the same defendants under the provisions of Title VII (A. 15).

CONCLUSION.

The decision of the courts below is predicated solely on failure to exhaust remedies.

The allegations of the amended complaint are quite broad in scope, partly because they are so loosely drawn. Nevertheless, they reveal that no attempt was made to process the claim against the Brotherhood for breach of the duty of fair representation under the Brotherhood's constitution. The Brotherhood, in short, was never given an opportunity based upon effective notice to responsible officers to correct the alleged abusive conduct on the part of its field representatives. A genuine attempt to obtain relief within the union's own tribunals against conduct of this character may and should be required as a condition precedent to seeking relief in the courts, and it manifestly was not an abuse of discretion on the part of the court to dismiss the complaint against the Brotherhood when such an attempt was not sufficiently alleged.

The lower courts' decisions are also correct in respect to Petitioners' claims against the Railroad. They are current, rather than discharged, employees of the Railroad, and their claims for promotions and back pay are within the exclusive jurisdiction of the National Railroad Adjustment Board.

For these reasons, we submit that the decision of the Court of Appeals below should be affirmed.

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